

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JAMES BASHON GARNER,

Plaintiff,

v.

Case No. 2:05-cv-79

HON. RICHARD ALAN ENSLEN

UNKNOWN NAPEL, et al.,

Defendant(s).

REPORT AND RECOMMENDATION

Plaintiff James Bashon Garner, an inmate at the Ionia Maximum Correctional Facility, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against defendants employed by the MDOC at the Marquette Branch Prison during the pertinent time period. Upon initial review, the court dismissed plaintiff's unexhausted claims and retained plaintiff's exhausted claims. Defendants now move for dismissal of the entire complaint under the total exhaustion rule that has already been rejected by this court.

The remaining defendants argue that this case should be dismissed under *Jones-Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), because plaintiff failed to exhaust every claim at the time he filed his complaint. However, another panel of the Sixth Circuit has more recently held that *Jones-Bey* was improperly decided. In *Spencer v. Bouchard*, ___ F.3d ___, 2006 WL 1528876 (6th Cir., June 6, 2006), the court held that the "partial exhaustion rule" is the law of this circuit requiring the dismissal of only those claims that are unexhausted and allowing the case to proceed on the exhausted claims. Therefore, authority exists to support the partial exhaustion rule employed by this court upon initial review.

Accordingly, it is recommended that defendants' motions to dismiss (Docket ## 22, 26 and 43) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: June 22, 2006